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NO. 82-1713

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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ELIZABETH A. FRAME, ET AL.,

PETITIONERS,

VS.

SOUTH BEND COMMUNITY SCHOOL CORPORATION, ET AL.,

RESPONDENTS.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Petitioners respectfully submit this Reply to the Brief in Opposition filed by the Respondents pursuant to the Order of this Court.

Respondents' Brief emphasizes the importance of this case. It evidences a perspective, common in the era of

dwindling school enrollments, which will seriously impair the freedoms of school age children and their parents across the country if permitted to grow unchecked. However, in their Brief in Opposition, the Respondents have made several fundamental errors.

I. Providing Bus Service to Parochial School Children is Not Aid to Religion.

The Respondents characterize this case as involving aid to the parochial school itself (Brief in Opposition at 11, 14, 15, 16, 18). That was also the characterization of the Court of Appeals. However, as we noted in our Petition for a Writ of Certiorari, such a perspective is not compatible with the earlier holdings of this Court. Everson v. Board of Education, 330 U.S. 1 (1947).

This mischaracterization of this case

pervades the Respondents' Brief in Opposition and only obfuscates the true issues involved.

II. Indiana Statutes and the Equal Protection Clauses of the United States and Indiana Constitutions Do Require Respondents to Provide Parochial School Children With Equal Bus Service.

Respondents' characterization of this case cannot be squared with the action of the Indiana Legislature which, despite the state constitutional provision against the expenditure of funds "for the benefit of any religious or theological institution," IND. CONST., §6, has permitted its school corporations to offer transportation services to all children. However the matter may be viewed in other states,[1] consistent with

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1 The Respondents rely heavily on Missouri state and constitutional

its Constitution, the Indiana Legislature has given local school boards the power to provide school bus transportation, as a safety service, to all children who attend public and private schools.

Respondents have attempted to divert this Court's attention from Petitioners' equal protection claims by highlighting only one Indiana statutory section dealing with bus service to parochial school children (Brief in Opposition at 8) and then, in n. 3 of their response (Brief in Opposition at 10), claiming that Petitioners' reliance on all applicable Indiana Statutes is an attempt to manufacture a statutory claim to equal transportation service.

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law, which is wholly different from Indiana law (Brief in Opposition at 11-14) and, insofar as Petitioners' equal protection claims are concerned, those cases are irrelevant.

Crucial to Petitioners' equal protection claim are the very Indiana Statutes Respondents have tucked away in n. 3 of their Brief in Opposition. In these Statutes, the Indiana Legislature gives local school boards the option to provide bus service to school children. Ind. Code 20-9.1-2-1 (Appendix at 81a).

The term "school children" means all children enrolled in public or private school between kindergarten and grade 12. Ind. Code 20-9.1-1-4 (Appendix at 80a).

The term "private school" means any school not supported by tax funds. Ind. Code 20-9.1-1-3 (Appendix at 80a).[2]

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2 These Statutory sections, and others dealing with such things as surety bonds, bidding requirements and bus driver contracts, do not apply to private school busing programs. I.C. 20-9.1-2-29. These Statutes do, however, govern the actions of local public school boards.

Petitioners claim that once the Respondents elected to provide bus service to school children, they were required, under the Equal Protection Clauses of the Federal and State Constitutions, to provide the service to all school children as commanded by the Indiana Legislature, and they could not withhold those services from school children who, on the basis of religious belief, attend parochial schools.

Contrary to the position they now assert, the Respondents candidly admitted in the District Court that Petitioners' equal protection analysis was correct (Transcript at 46), but that their obligation to bus parochial (as opposed to private nonsectarian) school students was limited by I.C. 20-9.1-7-1 (Transcript at 46). Moreover, in spite

of their protestation that, in applying the Indiana Statutes, they are not discriminating between sectarian and other private schools (Brief in Opposition at 14), the Respondents admitted in their Brief filed with the Seventh Circuit Court of Appeals that the Indiana Statutes did compel them to provide equal bus service to school children attending public and private nonsectarian schools and to deny that service to only those school chidren attending religiously-affiliated schools! (Brief of Defendants-Appellees at 17, 21). Respondents now argue, without once claiming that a compelling state interest is being advanced, e.g., Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969), that it is constitutionally permissible under Indiana law to discriminate

between school children attending private, sectarian and private, nonsectarian schools as to the quality and extent of bus service they may provide (Brief in Opposition at 15-16).[3] This untenable position and admission as to how the Respondents interpret and apply the Indiana Statutes is reason enough to grant the Petition for a Writ of Certiorari.

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3 Respondents fail to explain why, under the Indiana Constitution, it is permissible to provide bus service to all private, nonsectarian school children and some private, sectarian school children, but unconstitutional to provide bus service to all private, sectarian school children. If aid to religion was truly at issue here (and it is not), then the number of children who receive the aid would be irrelevant -- aid in providing bus service to parochial school children would violate the Indiana Constitution regardless of the number of school children receiving the aid.

The question presented, therefore, is quite different from and a good deal narrower than the one suggested by the Respondents. Contrary to their submission (Brief in Opposition at 18, et seq.), this case does not raise the issue of whether every educational opportunity or innovation implemented by the public school system must be offered to private schools. Rather, it asks -- quite simply -- whether a public body, when it offers a safety service to its children pursuant to state statutes authorizing the service for public and private school children, may distinguish between them simply because of their choice -- or their parents' choice -- of a school.

III. Respondents' Actions Have Burdened Petitioners' Free Exercise Rights.

It ought not go unnoticed that

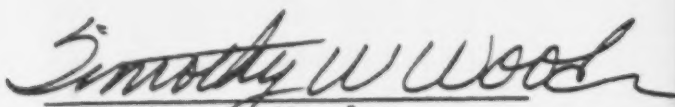
Respondents' mischaracterization of this case as involving assistance to the private schools rather than to the children who must travel to school is compatible with their declared motivation to burden those citizens who dare to attend the "competition." (Petition at 20-22). Indeed, the Respondents quite frankly allude to their preoccupation with "[T]he current difficulties" of the public education system (Brief in Opposition at 19). In South Bend, Indiana, as in other parts of the country, dwindling public school enrollments have meant fewer public schools -- and fewer public school jobs. However, local officials, concerned with the shrinkage of their domain, do not, under the Constitution of the United States, have the right to shore

up their economic position by denying individual citizens their Federal and State Constitutional rights.

Conclusion

For the foregoing reasons, and those previously asserted, Petitioners respectfully submit that their Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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